A

HSBC Bank Malaysia Bhd v Overseas Industries Sdn Bhd

B

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO (MT-1)24–3771 OF 2005
VERNON ONG JC
25 JULY 2008

C

Land Law — Charge — Construction of — Whether charge a continuing security — Whether chargor had shown cause to the contrary — Whether chargor prejudiced or misled by chargee's Form 16D notice

D

Land Law — Charge — Order for sale — Application for — Whether procedure under s 256 National Land Code meant to be speedy and summary in nature — Procedural requirements, whether satisfied — Cause to the contrary, whether in existence

E

Land Law — Charge — Order for sale — Cause to the contrary — Categories of — How established

F

The plaintiff extended to the defendant several credit facilities secured by a charge on the plaintiff's land ('the land'). The plaintiff later gave the defendant a hire purchase facility ('HP facility') under which terms the defendant undertook to allow the plaintiff to create a charge over the land to secure the repayment of all monies due under the HP facility. The defendant
G subsequently defaulted the credit and the HP facilities. The plaintiff moved to enforce the charge. The defendant opposed the application, inter alia, contending that the statutory notice Form 16D was invalid and ineffectual and that there existed 'cause to the contrary' in the plaintiff's application for an order for sale of the charged land.

H

Held, allowing the plaintiff's application:

I

(1) In an application for an order for sale under s 256 of the National Land Code ('NLC'), it is pertinent to note that the procedure under this section is meant to be speedy and summary in nature. The court is concerned with: (i) whether the chargee has given the appropriate statutory notices in accordance with the NLC; and (ii) whether the procedural requirements prescribed by O 83 of the Rules of the High

Court 1980 have been complied with. Once the conditions have been satisfactorily answered in the affirmative the court must deal with the question of whether the material produced before the court by the chargor constitutes cause to the contrary as stipulated under s 256(3) of the NLC. If the court is satisfied of the existence of a cause to the contrary, then the court will refuse an order for sale. In this respect the issue for determination is essentially a question of law depending on the interpretation of s 256(3) of the NLC (see para 7).

(2) Cause to the contrary under s 256(3) of the NLC is established only in three categories of cases. Firstly, when a chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC. Secondly, when a chargor demonstrates that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. And thirdly, when a chargor demonstrates that the grant of an order for sale is contrary to some rule of law or equity. If no cause to the contrary is shown, the court is obliged to make an order for sale (see para 9).

(3) An examination of clause 1 of the charge annexure revealed, firstly, that the extent of the defendant's covenant to pay all sums of money includes such sums as 'are now or shall from time to time be due and owing by the defendant to the plaintiff'. The charge was therefore in the nature of a continuing security. Secondly, the sums the defendant also covenanted to pay includes moneys due and owing on 'any current loan or other account or accounts or in any manner whatever whether as principal or surety'. This charge was therefore intended to secure the repayment of any and all accounts the defendant may have with the plaintiff. Taken together, the charge was a continuing security intended to secure the repayment of all sums of money due and owing on any and all accounts held by the defendant (see para 27).

(4) In the court's view the provisions of clause 1 and clause 26 in the charge annexure were clear and unequivocal. The defendant was a commercial entity and must be taken to have known and accepted the terms and conditions of the loan security documentation and charge annexure when it entered into them. There was no affidavit evidence to show or suggest that the defendant had been in any manner misled or prejudiced by the demand in the Form 16D. It was quite clear the plaintiff was entitled to combine the Al-Ijarah HP facility in the Form 16D. The plaintiff's claim in the Form 16D was well within the limit of the charge in the aggregate sum of up to RM250,000 for principal only (see para 28).

(5) In the particular circumstances of this case, the amounts claimed by the plaintiff in the Form 16D were not disputed. It was well within the knowledge of the defendant that the plaintiff was entitled to combine

all moneys due and owing by the defendant on any of the defendant's accounts with the plaintiff. Merely because the plaintiff had elected, as it was entitled to do so within the terms of the charge annexure, to combine the amount due and owing under the Al-Ijarah HP facility, it could not be said that on balance the defendant was prejudiced or misled. In the circumstances the Form 16D statutory notice was effectual and valid in law (see para 30).

(6) As a matter of law the defendant's allegation that the plaintiff had failed to satisfy the conditions precedent to the making of an order for sale was without basis. The facts relied upon by the defendant did not constitute cause to the contrary. The defendant had also failed to submit any factual material to show that it had been prejudiced or misled in any manner by the plaintiff's demand in the Form 16D statutory notice (see para 36).

[Bahasa Malaysia summary

Plaintif telah memberi defendan beberapa kemudahan kredit melalui satu cagaran ke atas tanah plaintif ('tanah tersebut'). Plaintif kemudian telah memberi defendan kemudahan sewa beli ('kemudahan SB') di bawah terma di mana defendan telah mengaku janji untuk membenarkan plaintif memasukkan gadaian ke atas tanah tersebut untuk menjamin bayaran balik semua wang yang perlu dibayar di bawah kemudahan SB. Defendan kemudian telah gagal membayar kemudahan-kemudahan kredit dan SB tersebut. Plaintif oleh itu telah menguatkuasakan gadaian itu. Defendan telah menentang permohonan itu, antara lain, dengan menegaskan bahawa notis statutori Borang 16D adalah tidak sah dan tidak berkesan dan bahawa terdapat 'cause to the contrary' dalam permohonan plaintif untuk perintah jualan tanah yang digadaikan itu.

Diputuskan, membenarkan permohonan plaintif:

(1) Dalam permohonan untuk perintah jualan di bawah s 256 Kanun Tanah Negara ('KTN'), adalah penting untuk disedari bahawa prosedur di bawah seksyen ini bermaksud untuk bersifat cepat dan terus. Mahkamah khuatir dengan: (i) sama ada pemegang gadaian telah memberikan notis-notis statutori yang sesuai menurut KTN; dan (ii) sama ada keperluan prosedur yang ditetapkan oleh A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 telah dipatuhi. Setelah syarat-syarat tersebut telah dijawab secara positif mahkamah hendaklah berdepan dengan persoalan sama ada bahan yang dikemukakan di hadapan mahkamah oleh penggadai membentuk kausa yang bertentangan seperti yang ditetapkan di bawah s 256(3) KTN. Jika

mahkamah berpuas hati dengan kewujudan kausa yang bertentangan maka mahkamah tidak akan memberikan perintah jualan. Berkaitan ini isu yang perlu ditentukan terutamanya adalah tentang persoalan undang-undang bergantung kepada pentafsiran s 256(3) KTN (lihat perenggan 7).

(2) Kausa yang bertentangan di bawah s 256(3) KTN dibuktikan hanya dalam tiga kategori kes-kes. Pertama, apabila penggadai boleh membawa kesnya dalam mana-mana pengecualian doktrin ketakboleh sangkalan dalam s 340 KTN. Kedua, apabila penggadai menunjukkan bahawa pemegang gadaian telah gagal memenuhi pra syarat untuk membuat permohonan untuk perintah jualan. Dan ketiga, adalah apabila penggadai menunjukkan bahawa pemberian perintah jualan adalah bertentangan dengan rukun undang-undang ekuiti. Jika tiada kausa yang bertentangan ditunjukkan, mahkamah hendaklah membuat perintah jualan (lihat perenggan 9).

(3) Ujian terhadap klausa 1 kepada lampiran gadaian menunjukkan, pertama, bahawa tahap waad defendan untuk membayar semua wang termasuk jumlah tertentu seperti 'are now or shall from time to time be due and owing by the defendant to the plaintiff'. Gadaian itu oleh demikian bersifat sebagai jaminan berterusan. Kedua, jumlah-jumlah yang defendan juga berwaad untuk bayar termasuk wang yang perlu dibayar dan tertunggak untuk 'any current loan or other account or accounts or in any manner whatever whether as principal or surety'. Gadaian ini oleh itu berniat untuk menjamin bayaran balik mana-mana dan kesemua akaun yang defendan mungkin ada dengan plaintif. Jika dilihat secara keseluruhan, gadaian itu merupakan jaminan berterusan yang berniat untuk menjamin bayaran balik kesemua jumlah wang yang perlu dibayar dan tertunggak untuk mana-mana dan semua akaun-akaun yang dipegang oleh defendan (lihat perenggan 27).

(4) Pada pendapat mahkamah peruntukan klausa 1 dan klausa 26 dalam lampiran gadaian adalah jelas dan nyata. Defendan merupakan entiti komersial dan hendaklah mengetahui dan menerima terma-terma dan syarat-syarat dokumentar jaminan pinjaman dan lampiran gadaian apabila ia memasukinya. Tiada keterangan afidavit untuk menunjukkan atau mencadangkan bahawa defendan telah dalam apa cara terpedaya atau diprejudis oleh tuntutan dalam Borang 16D. Adalah jelas plaintif berhak untuk menggabungkan kemudahan SB Al-Ijarah dalam Borang 16D. Tuntutan plaintif dalam Borang 16D adalah dalam batasan gadaian itu dalam jumlah agregat sehingga RM250,000 untuk prinsipal sahaja (lihat perenggan 28).

(5) Dalam keadaan tertentu kes ini, jumlah-jumlah yang dituntut oleh plaintif dalam Borang 16D tidak dipertikaikan. Ia dalam pengetahuan defendan bahawa plaintif berhak untuk menggabungkan kesemua wang

yang perlu dibayar dan tertunggak oleh defendan untuk mana-mana akaun defendan dengan plaintif. Hanya kerana plaintif telah memilih, seperti yang ia berhak berbuat demikian dalam lingkungan terma-terma lampiran gadaian, untuk menggabungkan jumlah yang perlu dibayar dan tertunggak di bawah kemudahan SB Al-Ijarah, ia tidak boleh dikatakan bahawa atas imbangan defendan telah diprejudiskan atau diperdaya. Dalam keadaan sedemikian notis statutori Borang 16D adalah berkuat kuasa dan sah di sisi undang-undang (lihat perenggan 30).

(6) Dari segi undang-undang pengataan defendan bahawa plaintif telah gagal untuk memenuhi pra syarat-pra syarat untuk membuat perintah jualan adalah tidak berasas. Fakta yang defendan bergantung kepada tidak membentuk kausa yang bertentangan. Defendan juga telah gagal untuk mengemukakan apa-apa bahan yang faktual untuk menunjukkan bahawa ia telah diprejudiskan atau diperdayakan dalam apa-apa cara oleh tuntutan plaintif dalam notis statutori Borang 16D (lihat perenggan 36).]

Notes

For cases on construction of charge generally, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2157–2469.

For cases on order for sale under charge, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

Cases referred to

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (distd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Malayan Banking Bhd v PK Rajamani [1994] 1 MLJ 405 (refd)

Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd [1990] 3 MLJ 493 (refd)

Public Bank Bhd v Noor Ehsannuddin bin Mohd Harun [2001] 5 MLJ 246 (refd)

Southern Bank Bhd v Chuah Beng Hock [1999] 5 MLJ 206 (distd)

Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd [1984] 1 MLJ 115 (refd)

Legislation referred to

Interpretation and General Clauses Ordinance 1948 s 2(1), Item 95

National Land Code ss 218(2), 219(1), 234, 242, 243, 256, 256(3), 340, Form 16D

Rules of the High Court 1980 O 83

TK Kee (Chee Siah Le Kee) for the plaintiff.

M Thomas Philip (Thomas Philip) for the defendant.

Vernon Ong JC:

[1] This is an originating summons ('the OS') filed by the plaintiff for an order for sale of a piece of land held under HS(D) 4002, TLO 456, Bandar Johor Bahru Daerah Johor Bahru, Johor ('the land') to be sold by public auction pursuant to s 256 of the National Land Code and O 83 of the Rules of the High Court 1980.

BACKGROUND FACTS

[2] Pursuant to the plaintiff's letter of offer dated 28 October 2002 the plaintiff approved and granted various credit facilities to the defendant amounting to RM750,000. The facilities were:

(i) overdraft of RM100,000;

(ii) one-off import line of RM250,000;

(iii) one-off total gross foreign exchange contract limit of RM250,000; and

(iv) import/export line comprising trust receipt/bankers acceptance of RM150,000.

[3] The said offer was accepted and a directors' resolution of the defendant company was passed on 30 October 2002. The defendant then entered into a trade financing general agreement with the plaintiff in 11 December 2002. In consideration of and as security for the repayment of the granting of the said facilities the defendant created the charge over the land in favour of the plaintiff for the limit of RM250,000 for principal only and interest thereon.

[4] By a letter dated 28 October 2002 the plaintiff also granted to the defendant an 'Al-Ijarah With Option To Purchase Facility' for RM250,000 subject to the terms and conditions contained therein. The defendant accepted the said facility and a directors' resolution dated 30 October 2002 was passed accordingly.

[5] By an equipment hire purchase agreement dated 18 November 2002 the plaintiff hired to the defendant two sets of MP-15T Full Automatic Powder Compacting Mechanical Press including one set of single shot die set and one tool with SKD-11 material for 45X45 11MM tablet electric clutch'. By a letter of undertaking dated 30 October 2002 from the defendant to the plaintiff the defendant undertook to allow the plaintiff to create a charge over the land to secure the repayment of all monies due under the equipment hire purchase agreement.

[6] The defendant defaulted in the payment of the hire rental under the equipment hire purchase agreement and utilised the overdraft beyond its limit. By a letter dated 9 June 2005 the plaintiff's solicitors demanded payment of the sum of RM320,206.73 due as at 30 May 2005. The defendant failed to comply with the said demand. Subsequently on 24 May 2005 the plaintiff's solicitors issued a statutory notice of default in Form 16D of the National Land Code ('NLC') demanding the outstanding amounts as at 6 October 2005. The said form is reproduced hereunder:

NATIONAL LAND CODE

FORM 16D

(Section 254)

NOTICE OF DEFAULT WITH RESPECT TO A CHARGE

To:

OVERSEAS INDUSTRIES SENDIRIAN BERHAD (Company No 8944-X) of No 9 Jalan Tara, Off Jalan Tampoi, Tampoi Industrial Area, 80350 Johor Bahru, Johor Chargor under the Charge described in the Schedule below of the land so described;

WHEREAS you have committed a breach of the provisions of this charge by failing and/or neglecting to pay to the Chargee the sum of RM266,030.35 as at 6.10.2005 in respect of the following Banking Facilities extended to you which have been combined, which sum is comprised as follows:

1. Overdraft Facility	RM115,502.81 together with further interest accruing on the sum of RM109,529.65 at the rate of 1.75% p.a. above the Base Lending Rate [Base Lending Rate as at 7.10.2005 is 6% p.a.] on daily rests from 7.10.2005 to the date of full realisation;
2. Al-Ijarah With Option To Purchase Facility	RM150,527.54 together with late payment charges at the rate of 1% p.a. calculating on daily basis on the overdue instalments from date of default to the date of full realisation.

The principal amount for the overdraft as at 6.10.2005 was RM100,000.00 and the total outstanding amount for the Al-Ijarah With Option To Purchase Facility as at 6.10.2005 was RM209,897.54 inclusive of late payment charges of RM527.54.

AND WHEREAS the breach has continued for a period of not less than ONE (1) MONTH prior to the date of this Notice;

We, as Chargee, by virtue of the powers conferred by Section 254 of the National Land Code hereby require you within a period of SEVEN (&) DAYS from the date of receipt of this Notice hereof to remedy the breach;

AND TAKE NOTICE that if you fail to remedy the breach within that period we shall apply for an Order for Sale.

Dated this 24th day of October 2005

t.t

Messrs Chee Siah Le Kee & Partners

Solicitors for HSBC Bank Malaysia Berhad

In an application for an order for sale under s 256 of the NLC, it is pertinent to note that the procedure under this section is meant to be speedy and summary in nature. The court is concerned with: (1) whether the chargee has given the appropriate statutory notices in accordance with the NLC; and (2) whether the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Once the aforesaid conditions have been satisfactorily answered in the affirmative the court must deal with the question of whether the material produced before the court by the chargor constitutes cause to the contrary as stipulated in sub-s (3) of s 256 of the NLC. If the court is satisfied of the existence of a cause to the contrary, then the court will refuse an order for sale. In this respect the issue for determination is essentially a question of law depending on the interpretation of s 256(3) of the NLC. Section 256 of the NLC provides as follows:

256 Application to Court for order for sale

(1) This section applies to land held under —

(a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title,

and to the whole of any divided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

(3) On any such application, the court shall order the sale of the land or lease to which the charge relates *unless it is satisfied of the existence of cause to the contrary*.

(Emphasis added.)

[8] The principles governing the hearing of a challenge against the enforcement of a chargor's rights under s 256 of the NLC has been clearly

enunciated by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. It is worthwhile revisiting this landmark decision. In *Low Lee Lian* the appellant charged his land to the respondent bank as security for a loan granted by the respondent bank to a third party. When the third party defaulted in the repayment of the loan the respondent bank applied to enforce the statutory charge by way of an order for sale. The appellant resisted the respondent bank's application but the judge directed the sale of the land by public auction. The appellant appealed against the order. The appellant argued that: (i) the respondent bank had varied the interest rate without giving any notice to the appellant; and (ii) the respondent bank had, without the appellant's knowledge, permitted the third party to breach the terms of the agreement between them. The principal issue for the determination of the Federal Court was whether, even if the complaints by the appellants were made out, they constituted sufficient reason for the refusal of an order for sale by establishing 'cause to the contrary' under s 256(3) of the NLC. The judgment of the Federal Court spoken through Gopal Sri Ram JCA at p 82 is particularly illuminating:

> In our judgment, 'cause to the contrary' within 256(3) may be established only in three categories of cases.
>
> First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the Code establishes cause to the contrary. That section provides as follows:
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent —

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-ss (2) and (4)(b) above will be held to have established cause to the contrary under s 256(3). The decision of Smith J in *Subchent Kaur v Chai Sau Kian* [1958] MLJ 32, of the former Federal Court in *Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189, of Raja Azlan Shah J (as he then was) in *Overseas Union Finance Ltd v Lim Foo Chong* [1971] 2 MLJ 124 and that of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 (affirmed on appeal) sufficiently illustrate the proposition now under discussion.

Secondly, a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the charger of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 at p 298 where he said:

> I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a charger, who shows that there would be no need to sell his land if the chargee paid up in full what is due from himself an another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously

A contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'shew cause' either in law or equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

In *Murugappa Chettiar* (ibid), the appellant was one of two co-proprietors of land. The proprietors jointly charged the land to the respondent as security for a loan. The chargee commenced proceedings under s 149 of the Land Code (Cap 138), the precursor to s 256(3), which read as follows:

After such default in payment or observance continuing for the space of one month from the service of such notice or for such other period as may in such instrument be for that purpose limited, it shall be lawful for the chargee, by summons, to call the proprietor of the charged land before the court to shew cause why the land subject to the charge should not be sold by public auction under direction of the court. If no cause be shewn to the satisfaction of the court, it shall order the public sale of land to take place at such place and time as shall appear most suitable, but not less than four weeks from the date of the order, and it shall be the duty of the registrar of the court to see that such sale is publicly notified during these four weeks in such manner as may be usually adopted for such notifications for the time being, or as shall be regulated by any rules of court in that behalf.

The appellant alleged that he was liable for only half the loan amount and that he had made part payment of that sum. He paid the balance due from him into court and alleged that the other charger who was liable for the remaining half was the nominee of the respondent chargee. All these allegations were not denied by the respondent chargee. The judge at first instance granted an order for sale without investigating any of these allegations. The FMS Court of Appeal held that there ought to have been an investigation into the unrefuted allegations, allowed the appeal and remitted the matter to the judge for trial of the issues. It was in this context that the remarks by Aitken J in the FMS Court of Appeal in the passage earlier quoted were uttered.

In *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ at p 460, the Privy Council, while acknowledging the existence of the proposition, limited its operation in the following terms:

Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

In a later passage, after reproducing s 340 of the Code, Lord Oliver of Aylmerton who delivered the opinion of the Board said:

> Even assuming — a point which does not arise in the instant case and has not been argued — that this section [ie s 340] might not protect a purchaser or chargee acquiring title with actual notice of the equitable interest of a purchaser, Their Lordships are quite unable to see how the interest of a purchaser who has expressly consented to the creation of the chargee's interest could prevail over the registered title. Nor, in Their Lordships' opinion, could it furnish a 'cause to the contrary' for the purposes of s 256.

It is thus clear that to fall within the scope of the principle in *Murugappa Chettiar*'s case, the charger must be able to point to a statutory direction or some rule of the common law or doctrine of equity operating in his favour and against which an order for sale would militate. Anything that falls short of this requirement will not amount to cause to the contrary under s 256(3). As was observed by Harun Hashim SCJ (albeit in another context) when delivering the judgment of the Supreme Court in *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ at p 487:

> The issue as to the rights of an innocent purchaser for value, with or without notice of the charge as against a registered chargee has been considered by the courts and is now settled law: see eg *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81; *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54; *Perwira Habib Bank (M) Bhd v Oon Seng Development Sdn Bhd* [1990] 1 MLJ 47. In all these cases, it was held that the interest of a registered chargee is indefeasible by s 340(1) of the Code unless it is made defeasible by s 340(2). The indefeasibility of the chargee's interest is not affected by the chargor's conduct, however unconscionable or deceitful it may be, unless it can be shown that there was collusion between the charger and the chargee to defeat the interest of a third party. The interest of a bona file purchaser for value cannot prevail over that of a registered chargee.

[9] It is then clear that cause to the contrary under s 256(3) of the NLC might be established only in three categories of cases. Firstly, when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC. Secondly, when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale. And thirdly, when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale. In determining whether the defendant has demonstrated a cause to the contrary the court considered the following affidavits were filed in connection with the hearing of the OS:

The plaintiff's affidavit (1) affirmed on 28 February 2006	encl 3
The defendant's affidavit (1) affirmed on 30 March 2007	encl 3A

The plaintiff's affidavit (2) affirmed on 13 July 2007	encl 13
The defendant's affidavit (2) affirmed on 13 August 2007	encl 13A
The plaintiff's affidavit (3) affirmed on 6 September 2007	encl 16
The defendant's affidavit (3) affirmed on 30 October 2007	encl 18
The plaintiff's affidavit (4) affirmed on 23 November 2007	encl 22

THE DEFENDANT'S SUBMISSION

[10] In resisting the OS the defendant's only contention is premised on the second exception, namely that the plaintiff has failed to satisfy the conditions precedent to the making of the order for sale. Learned counsel for the defendant submitted that in the Form 16D statutory notice the plaintiff has demanded for amounts due in respect of an Al-Ijarah With Option To Purchase Facility for the purposes of financing a hire purchase agreement ('the Al-Ijarah HP facility').

[11] Learned counsel submitted that the Form 16D is ineffectual and invalid because the plaintiff was demanding payment for something to which the plaintiff had no right (*Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283). It was also submitted that no charge is effective unless registered. Accordingly, the plaintiff should not be allowed the inclusion of an unregistered charge that would clearly prejudice the rights of the defendant (*Southern Bank Bhd v Chuah Beng Hock* [1999] 5 MLJ 206). Finally, it was submitted that as the Form 16D demands for what is not due the Form 16D is void and the court will refuse to make an order for sale (*Public Bank Bhd v Noor Ehsannuddin bin Mohd Harun* [2001] 5 MLJ 246).

[12] The defendant accepts that the demand for monies for the overdraft facility in the sum of RM115,502.81 is not in issue. However, it is the defendant's contention that the demand for the sum of RM150,527.54 under the Al-Ijarah HP facility is clearly outside the terms of the registered charge. In this instance learned counsel referred to the extract of the board of directors meeting of the defendant company on 30 October 2002 relating to the Al-Ijarah HP facility which reads as follows:

> Security
>
> That the aforementioned facility is secured against the following:
>
> (i) An Equipment Hire Purchase agreement for a total rental of RM307,500.00

(ii) A Joint & Several Guarantee of the Directors of RM250,000.00 from the Directors i) Jigarlal K Doshi And ii) Pangajavalee Sinatamby

A letter of undertaking by the Company to create a charge over property held under TLO 456, Township and District of Johor Bahru, when called to do so by the Bank.

[13] Learned counsel also referred to (i) the defendant's letter dated 30 October 2002 to the plaintiff wherein the defendant, inter alia, stated that 'Overseas Industries Sdn Bhd hereby undertake to allow your Bank to create charge over property held under TLO 456 Township and District of Johor Bahru if so required to secure all monies owing to your Bank in respect of the above mentioned Hire Purchase Agreement'; and (ii) to cl 7(c) in the plaintiff's letter of offer dated 28 October 2002 pertaining to the A-Ijarah HP facility. Learned counsel for the defendant submitted that on the basis of the aforesaid documents it is clear that the defendant would only have to create a charge over the land 'when called to do so by the Bank'.

[14] In the second instance learned counsel for the defendant submitted that the plaintiff has not called upon the defendant to create such a charge on the land and as such that charge does not exist; a charge only takes effect upon registration (s 234 of the NLC; *Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd* [1990] 3 MLJ 493).

[15] Thirdly, learned counsel for the defendant submitted that pursuant to the plaintiff's letter dated 29 July 2003 the plaintiff offered to renew the banking facilities for Account No 311-804298-101 which included only the overdraft facility, the foreign exchange, one off import line and import/export line. No reference was made in regard to the Al-Ijarah HP facility. Fourthly, learned counsel for the defendant submitted by its letter dated 9 March 2005 the plaintiff implicitly admitted that the Al-Ijarah HP facility is not part of the charge. This is evident when the plaintiff said that 'we hereby exercised our right to combine the Al-Ijarah facility with the overdraft facility' in an attempt to bring it within the charge. Therefore, it was submitted that if indeed the Al-Ijarah HP facility is part of the charge it would be superfluous to the plaintiff to purport to combine the Al-Ijarah HP facility with the overdraft facility.

[16] Learned counsel for the defendant submitted that the plaintiff purported to exercise its right to combine and consolidate the Al-Ijarah HP facility with the overdraft facility. This purported combination of accounts is not reflected in the Form 16D. Further, the plaintiff's reliance on cl 26 of the charge annexure to combine and consolidate the said accounts is misconceived. Learned counsel argued that firstly, in the plaintiff's letter dated 9 March 2005 purporting to exercise such right did not do so by

reference to cl 26. The said reference to cl 26 is asserted for the first time in the application for the order for sale to justify the plaintiff's demand for the amounts due under the Al-Ijarah HP facility which is outside the charge. As such the reference to cl 26 is an afterthought.

[17] Learned counsel for the defendant further submitted that cl 26 does not give the plaintiff the right to convert facilities which are not within the terms of the charge to one which is secured by the charge. It was also submitted that the defendant had on 22 February 2005 offered to pay to the plaintiff RM105,000 as full and final settlement of the overdraft facility towards redeeming the land. However, the plaintiff had wrongly rejected the defendant's offer without any plausible reasons. It was accordingly submitted that in the circumstances the plaintiff's conduct is unreasonable and unconscionable.

THE PLAINTIFF'S REPLY

[18] According to learned counsel for the plaintiff the amount of RM266,030.35 demanded in the Form 16D comprised of two accounts, namely:

(a) RM115,502.81 for overdraft where the principal amount was RM100,000; and

(b) RM150,527.54 for the Al-Ijarah HP facility where the principal amount was RM150,000.

[19] It was pointed out that even though the total amount due under the Al- Ijarah HP facility was RM209,897.54, however, for the purposes of the claim in the Form 16D, the plaintiff was only claiming for RM150,527.54. In the premises the principal amount claimed for both facilities in the Form 16D is RM250,000 only. This figure is consistent with the principal amount of RM250,000 secured by the charge. Learned counsel for the plaintiff further submitted that the basis upon which the claim for the two accounts were made in the Form 16D is provided in cl 1 of the charge annexure. Clause 1 is as follows:

> 1. Covenant To Pay On Demand
>
> In consideration of the Chargee granting or continuing to grant to the Chargor general banking facilities from time to time the Chargor HEREBY COVENANTS with the Chargee that, subject as hereinafter provided, the land(s) described in the Memorandum of Charge above is/are together with the building(s) erected or to be erected thereon (hereinafter called 'the said land') charged for the benefit of the

Chargee with the repayment to the Chargee ON DEMAND by notice in writing of the Chargee made to the Chargor:

(a) *of all sums of money which are now or shall from time to time be due and owing by the Chargor to the Chargee (at any of the Chargee's branches) whether certain or contingent or incurred to the Chargee from or by the Chargor anywhere on any current loan or other account or accounts* or in any manner whatever whether as principal or surety and whether alone or jointly with any other persons firms or companies including the balance for the time being owing for or in respect of cheques bills notes and any other negotiable instruments accepted paid or discounted for and on behalf of the Chargor either alone or jointly with another or others or for any other payments loans credits or advances made to or for the use or accommodation or on behalf of the Chargor whether alone or jointly with another or others pursuant to or in respect of or under any guarantees or letter of credit given or established or opened by the Chargee for the Chargor or at the Chargor's request to third parties including any of the Chargee's branches or members of the HSBC Group for the Chargor's benefit or for the benefit of other third parties or any contracts for the forward delivery of goods bills or specie or *in respect of any other banking facilities whatsoever whether or not given upon or under any trust receipts of other security whatsoever or otherwise howsoever up to an aggregate sum of Ringgit Malaysia Two Hundred and Fifty Thousand (RM250,000.00) for principal only and interest thereon* as calculated in the manner hereinbelow provided;

(b) commitment fees commission discount and all other banking charges;

(c) all costs charges and other expenses which the Chargee may pay or incur in registering this Charge or in perfecting or in enforcing the security or obtaining payment of such sums of money; and

(d) all sums of money which the Chargee may pay or incur on behalf of the Chargor in the manner hereafter provided;

with interest thereon as hereinbelow provided.

(Emphasis added.)

[20] It was submitted that according to cl 1 the plaintiff cum chargee is entitled to claim for all moneys whatsoever now or hereafter from time to time owing to the plaintiff provided that the amount claimed is within the limit of the charge, ie the aggregate sum of RM250,000 for principal only. The charge is wide enough to cover the Al-Ijarah HP facility provided that the combined principal amount of the two facilities does not exceed the principal limit of RM250,000. In short, it is the plaintiff's position that its

demand for RM150,527.54 under the Al-Ijarah HP facility in the Form 16D is not premised upon the defendant's letter of undertaking to create a charge. Instead, the plaintiff is relying upon cl 1 of the charge annexure in making the claim; in particular the defendant's covenant to pay the sums described in para (a) in cl 1 aforesaid.

[21] In support thereof learned counsel referred to *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405. In that case the bank granted to the borrower an overdraft facility of RM50,000 to be secured by a first legal charge on a property on 4 April 1984. In October 1984 the bank granted an additional facility of RM10,000 to be secured by a second legal charge on the property. Subsequently on 7 March 1986 the bank renewed the overdraft facility of RM60,000 to be secured by a first legal charge. Owing to the borrowers default to repay the outstanding overdraft the bank applied for an order for sale of the property. The issue before the court was whether the facility given in the letter of 7 March 1986 was a new facility or a continuing facility secured by the existing charges. The Supreme Court held that in the circumstances of the case the facility of 7 March 1986 was a continuing facility and the security created by the first and second charge was a continuing security for which the bank had rightly based its application for an order for sale. Mohamed Dzaiddin SCJ (as he then was) speaking for the Supreme Court said at p 411:

> Looking at the substance of the matter, by which we mean the whole transaction, the first thing which strikes us is that the said property is still encumbered with the first and second legal charges and has remained so until today. The first and second facilities were granted on 4 April and 16 October 1984 respectively, which were secured by the aforesaid charges. Bearing in mind that the security for the new facility would be the first legal charge on the same property, it is imperative for the existing legal charges to be discharged before a fresh first legal charge is created. It is trite law that there cannot be a first legal charge on a property unless the title is free from all earlier charges. In the instant case, there has to be a discharge of charge of the said property. Alternatively, the said letter should stipulate under 'security' a condition that there should be a discharge of charge of the said property before a fresh first legal charge is created. Yet, we find nothing was mentioned in the said letter. In practice, it is not uncommon for financial institutions to specify such a condition in the letter of offer granting loans to their customers. Therefore, in view of the existing first and second legal charges registered on the said property, it was wrong for the learned judge to have held that the earlier securities had expired. In our view, the two charges, being security for the earlier facilities, are still valid because of what is stipulated in cl 6 of the annexure to the charges. *It states that the security created by the charge is expressly intended to be and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the bank by the customer.*
>
> (Emphasis added.)

[22] Learned counsel for the plaintiff also submitted that according to cl 26 of the charge annexure it is not necessary for the two facilities to be consolidated into one account. It is necessary to examine cl 26 which provides as follows:

> 26 Set-off
>
> The Chargor agrees (and irrevocably authorises the Charge until this Charge is discharged) that the Chargee may at any time without notice after an event of default or in making demand notwithstanding any settlement of account or other matter whatsoever *combine or consolidate all or any of the then existing accounts of the Chargor or of the Chargor* jointly with others (whether deposit loan or of any other nature whatsoever whether subject to notice or not and whether in Ringgit or in any other currency) in any of the Chargee's branches wheresoever situate and set-off or transfer any sum standing to the credit of any one or more accounts in or towards satisfaction of any moneys obligations and liabilities of the Chargor to the Chargee whether such liabilities be present actual contingent primary collateral several or joint. Where such combination set-off or transfer requires the conversion of one currency into another such conversion shall be calculated at the then prevailing spot rate of exchange of the Chargee (as conclusively determined by the Chargee) for purchasing the currency for which the Chargor is liable with the existing currency so converted.
>
> (Emphasis added.)

[23] Learned counsel for the plaintiff submitted that cl 26 entitles the plaintiff to combine or consolidate all or any of the then existing accounts of the defendant or of the defendant jointly with others (whether deposit loan or of any other nature whatsoever). Notwithstanding the subtitle 'Set-off' in cl 26, learned counsel submitted that cl 26 clearly provides that the plaintiff "may at any time without notice after an event of default or in making demand notwithstanding any settlement of account of other matter whatsoever combine or consolidate all or any of the then existing accounts of the chargor.

[24] The defendant's final contention that the plaintiff had wrongly rejected the defendant's offer to pay RM105,000 as full and final settlement of the overdraft facility towards redeeming the land is without basis. In the plaintiff's letter dated 9 March 2005 in reply to the defendant's proposal, the plaintiff said, inter alia, that:

> We wish to state that as at 02 March 2005, the outstanding amount due and owing to us is as follows:
>
> (a) Overdraft — RM104,590.78
>
> (b) SDI account — RM3,973.16
>
> (c) Al-Ijarah with option to purchase facility — RM209,529.87

A As the charge over the said property was created to secure banking facilities up to a limit of RM250,000.00 being the principal amount, the redemption sum shall be RM250,000.00. Further we hereby exercised our right to combine the Al-Ijarah facility with the overdraft facility.

B

[25] The plaintiff was entitled to reject the defendant's proposal. Pursuant to cl 1 of the charge annexure the charge over the land was intended to be a continuing security for the repayment of all moneys due and owing by the defendant to the plaintiff on any accounts held by the defendant with the C plaintiff up to an aggregate sum of RM250,000 for principal only. The reply by the plaintiff was an assertion of its rights under terms and conditions of the charge annexure to demand for RM250,000 in order to redeem the charge over the land.

D FINDINGS OF THE COURT

[26] Upon an examination of cl 1 of the charge annexure it is evident firstly, that the extent of the defendant's covenant to pay all sums of money E includes such sums as are now or shall from time to time be due and owing by the defendant to the plaintiff. The charge is therefore in the nature of a continuing security. Secondly, the sums the defendant also covenanted to pay includes moneys due and owing on 'any current loan or other account or accounts or in any manner whatever whether as principal or surety'. This F charge is therefore intended to secure the repayment of any and all accounts the defendant may have with the plaintiff. Taken together, it means that the charge is a continuing security intended to secure the repayment of all sums of money due and owing on any and all accounts held by the defendant.

G

[27] Turning now to the defendant's contention that the conditions precedent to the making of the order for sale have not been satisfied. It was submitted that the claim for the amount due in respect of the Al-Ijarah HP facility is clearly outside the terms of the charge. As the Form 16D demand H is contaminated with a claim which the plaintiff had no right to make, the Form 16D is invalid and ineffectual. In the circumstances of this case can it be said that the defendant has been misled or prejudiced so as to render the granting of the order of sale unjust. In the court's view the provisions of cl 1 and cl 26 in the charge annexure are clear and unequivocal. The defendant I is a commercial entity and must be taken to have known and accepted the terms and conditions of the loan security documentation and charge annexure when it entered into them. There is no affidavit evidence to show or suggest that the defendant has been in any manner misled or prejudiced by the demand in the Form 16D. It is quite clear the plaintiff is entitled to

combine the Al-Ijarah HP facility in the Form 16D. The plaintiff's claim in the Form 16D is well within the limit of the charge in the aggregate sum of up to RM250,000 for principal only.

[28] In *Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd* [1984] 1 MLJ 115 the appellant appealed against the decision of the High Court dismissing the application to set aside the order of the Collector of Land Revenue that the land be sold for failure to comply with two notices of default in Form 16D. The appellant argued that: (i) the heading of the two notices in Form 16D referred to 'Notice of Default with respect to a charge' and not with respect to 'charges', and whereas two charges and not merely one were shown in the Schedule to both the Form 16D notices; and (ii) the bank ought to have issued a separate statutory notice for each of the two charges and each notice should contain the outstanding sum under each charge. Accordingly, the appellant argued that both notices were invalid and bad in law. The Federal Court held that: (i) the Form 16D notices were effective and good in law because Item 95 in s 2(1) of the Interpretation and General Clauses Ordinance 1948 provided that words and expressions in the singular include the plural and vice versa, and (ii) although there were two charges they relate to the same land and the same parties were involved. Merely because the notices contained both the charges and the amounts due from each was combined it could not be said that the appellant was thereby prejudiced or misled. The breach and non-compliance with the notices had been admitted and so was the total amount due from both charges. Mohamed Azmi FJ said at p 118:

> Before us, it is also argued that the defect is substantial enough to prejudice the appellant to rectify the breach. In our view, whether a notice of default with respect to a charge or charges in Form 16D is bad in law would depend on whether the chargor has been prejudiced or misled by any defect in the notice so as to render the granting of the order for sale unjust, and this in turn must necessarily depend on the circumstances of each particular case.

[29] In the particular circumstances of this case the amounts claimed by the plaintiff in the Form 16D are not disputed. It was well within the knowledge of the defendant that the plaintiff was entitled to combine all moneys due and owing by the defendant on any of the defendant's accounts with the plaintiff. Merely because the plaintiff had elected, as it was entitled to do so within the terms of the charge annexure, to combine the amount due and owing under the Al-Ijarah HP facility, it could not be said that on balance the defendant was prejudiced or misled. In the circumstances the Form 16D statutory notice is effectual and valid in law.

[30] Turning now to the four cases cited by learned counsel for the defendant. In *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd*

A [1991] 2 MLJ 283 there were inconsistencies as regards the amount that the bank said was owing to them. The defendant argued that the bank was not entitled to charge default interest since they had not been given any notice pursuant to cl 5 of the charge annexure which provided that such notice shall be given before the default interest could be imposed. The High Court found
B that the sum demanded by the bank in their notices of demand had included the element of default interest. Clause 5 of the charge annexure required a notice to be served before any default interest could be imposed and there was no evidence to show that such notice had in fact been given either to the borrower or the defendant. The bank failed to deny, contradict or challenge
C the allegations made by the defendant. The Form 16D notice was rendered ineffectual and invalid by the wrongful demand for payment of the default interest to which the bank was not entitled. This case can be distinguished because the default interest claimed by the bank was in the particular circumstances of that case something which the bank was not entitled to.
D Accordingly this case is of no aid to the defendant's contention.

[31] In *Southern Bank Bhd v Chuah Beng Hock* [1999] 5 MLJ 206 the borrower was granted a RM1.8m loan overdraft facility from the bank. The
E loan was secured by a charge on a piece of land. Subsequently an additional sum of RM700,000 was sought by the borrower. The land office rejected the application for registration of a second charge over the said land to secure the additional loan. Notwithstanding the aforesaid the bank disbursed the additional loan of RM700,000. When the borrower defaulted in repayments
F of the loan facilities the bank issued a Form 16D notice claiming for RM2.7m inclusive of interest. The issue was whether the Form 16D in question was ineffectual and void as it included the amount of RM700,000. The High Court held that as the land was only charged up to RM1.8m the inclusion of RM700,000 would clearly prejudice the rights of the defendant.
G This case can be distinguished from the facts of the present case. In that case the amount of RM2.7m claimed in the Form 16D exceeded the limit of RM1.8m in the charge thereby rendering it to be ineffectual and void. In the present case the amount claimed in the Form 16D did not exceed the limit of the charge. Further, the defendant's contention that the plaintiff is
H purporting to include an unregistered charge is unsupported and unsubstantiated. Accordingly, this case is of no aid to the defendant's contention.

[32] In *Public Bank Bhd v Noor Ehsannuddin bin Mohd Harun* [2001] 5
I MLJ 246 the bank granted a fixed loan of RM125,000 and an overdraft of RM45,000 to the borrower secured by two legal charges over the borrower's land. Subsequently the bank granted to the borrower an overdraft of RM650,000 secured by a deposit of shares. When the borrower defaulted in the repayments the bank issued a Form 16D notice demanding for

RM621,318.24 due and owing on the fixed loan (RM130,177.86), the first overdraft (RM62,515.21) and the second overdraft (RM428,625.17). The issue before the High Court was whether the Form 16D issued by the bank was bad as it required the borrower to remedy not only the breach with respect to the charge but also with respect to the breach of the second overdraft facility secured by the deposit of shares. In that case it was agreed by counsel for the borrower and the bank that the application for an order for sale was only with regard to the sums outstanding on the fixed loan and the first overdraft, being the loans secured by the two legal charges. Notwithstanding the aforesaid the High Court held that the bank had no right to use the notice in Form 16D to demand the additional sum due and owing under the second overdraft which was secured by the deposit of shares. In the consequence the bank's application for an order for sale was dismissed.

[33] In the present case the demand in the Form 16D is for an aggregate amount which is within the limit of the charge. The plaintiff's aforesaid demand for the amounts due and owing on the Al-Ijarah HP facility and the overdraft facility is in accordance with the terms of the charge annexure. This is evident in the plaintiff's letter dated 9 March 2005 to the defendant exercising their right to combine the Al-Ijarah HP facility with the overdraft facility. In contrast it was not in dispute that the bank's application for an order for sale was only with regard to the fixed loan and the first overdraft, both secured by legal charges. The bank in that case had, however, also demanded for the amount owing under the second overdraft which was secured by the deposit of shares. The said demand for a sum to which the bank was not entitled to under the charge constituted a defect. The borrower has been prejudiced or misled by the said defect in the notice so as to render the granting of the order of sale unjust.

[34] In *Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd* [1990] 3 MLJ 493 the defendants created a first legal charge over their land in favour of Citibank to secure a loan of RM200,000. Five years later the defendant obtained a loan from the plaintiff for RM200,000 to settle the debt owing to Citibank. As security for the loan the defendant agreed to create a fresh charge in favour of the plaintiff. Upon payment being made to Citibank a discharge of charge was executed by Citibank and a fresh charge in favour of the plaintiff duly executed by the defendant. Subsequently the charge documents which were presented for registration at the land office could not be registered because of the existence of a private caveat which had been lodged against the land. In the meantime the defendant defaulted in repayment of their loan and the plaintiff applied for an order for sale. The issue before the court was whether the plaintiff, who stepped into the shoes of Citibank by subrogation, can obtain an order for sale under s 256 of the NLC and whether equitable rules apply under the NLC. The High Court

held that taking into account ss 242, 243, 218(2) and 219(1) of the NLC, the plaintiff cannot enforce their right as equitable chargee to obtain an order for sale under s 256 of the NLC. The NLC, being a complete and comprehensive Code of law governing land clearly requires the charge to be registered in its prescribed form before a chargee can enforce his right of foreclosure under the NLC. This case is also distinguishable with the facts of this case. In the present case the plaintiff's claim for the amount due and owing under the Al-Ijarah HP facility is within the terms and conditions of the charge annexure of a charge which has been registered. The plaintiff is not purporting to enforce their right as an equitable chargee. Accordingly this case is also of no aid to the defendant's contention.

[35] In conclusion it is the court's finding that as a matter of law the defendant's allegation that the plaintiff has failed to satisfy the conditions precedent to the making of an order for sale is without basis. The facts relied upon by the defendant do not constitute cause to the contrary. The defendant has also failed to submit any factual material to show that it has been prejudiced or misled in any manner by the plaintiff's demand in the Form 16D statutory notice. In the premises the court granted an order in terms of the OS.

Application allowed.

Reported by Andrew Christopher Simon